

①  
88-170

Supreme Court, U.S.  
**FILED**  
JUL 7 1988

JOSEPH E. SPANIO, JR.  
CLERK

NO. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

MARY DANGERFIELD BENGIVENGA,  
*Petitioner*

v.

UNITED STATES OF AMERICA,  
*Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

FRANK M. GARZA  
*Attorney In Charge  
For Petitioner*

CANALES & ASSOCIATES, P.C.  
Attorneys at Law  
2601 Morgan Ave.  
P. O. Box 5624  
Corpus Christi, Texas 78465  
(512) 883-0601



**QUESTIONS PRESENTED**

1. Whether Petitioner was subjected to custodial interrogation before being informed of her *Miranda* rights when she was removed from a public bus and taken to a Border Patrol office.
2. Whether the act of producing the bus ticket and baggage claim stubs connecting Petitioner to marijuana-filled suitcases was testimonial and subject to suppression.

## II

### TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	I
TABLE OF CONTENTS .....	II
TABLE OF AUTHORITIES .....	III
OPINIONS BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL PROVISIONS INVOLVED .....	2
STATEMENT .....	2
REASONS FOR GRANTING THE PETITION .....	5
CONCLUSION .....	8
ATTACHMENT A—Opinion of Court of Appeals (845 F.2d 593) .....	1a
ATTACHMENT B—Opinion of Court of Appeals (811 F.2d 853) .....	34a
ATTACHMENT C—Opinion and Judgment of District Court .....	40a



### III

## TABLE OF AUTHORITIES

CASES	Page
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 442 (1984) .....	5, 6
<i>Fisher v. United States</i> , 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976) .....	7, 8
<i>United States v. Alvarado</i> , 781 F.2d 422, 425-26 (5th Cir. 1986) .....	4
<i>United States v. Mary Bengivenga</i> , 811 F.2d 853 (5th Cir. 1987), 845 F.2d 593, 600, 604, 607 (5th Cir. 1988) ...	4, 5, 6, 7, 8
<i>United States v. Doe</i> , 465 U.S. 605, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984) .....	7, 8
<i>United States v. Phillips</i> , 812 F.2d 1355 (11th Cir. 1987) ..	5



NO. \_\_\_\_\_

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

---

MARY DANGERFIELD BENGIVENGA,  
*Petitioner*

v.

UNITED STATES OF AMERICA,  
*Respondent*

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

FRANK M. GARZA, on behalf of Mary Dangerfield Bengivenga,<sup>1</sup> petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

**OPINIONS BELOW**

The opinions of the Court of Appeals are reported at 845 F.2d 593 (Attachment A) and 811 F.2d 853 (Attachment B). The opinion and Judgment of the District Court is not reported. (Attachment C).

---

1. The parties in the Court below were Mary Dangerfield Bengivenga, as appellant-defendant, the United States, as appellee-plaintiff.

## JURISDICTION

The decision of the Court of Appeals which reversed Petitioner's conviction was entered on February 23, 1987. This decision was then vacated and the conviction was affirmed *en banc* on May 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

## STATEMENT

On February 1, 1986, Petitioner and a friend, Dolly Gore, were passengers on a Trailways Bus which departed from McAllen, Texas, a point within the United States. The bus was stopped at the Falfurrias Border Patrol Checkpoint for inspection. (3 ROA 4, 5). At the time of the stop, Border Patrol Agent Santana boarded the bus and conducted a routine inspection of the passengers and determined that all were legally in the country. (3 ROA 10, 81). His inspection included questioning various passengers about their national origins and destinations and requiring certain passengers to produce identification. (3 ROA 81). Border Patrol Agents Santana and Ramos then went on to inspect the luggage bins of the bus to search for illegal aliens. (3 ROA 78, 82). No aliens were discovered, however, the agents located three suitcases which they were "certain" contained marijuana and were destined for Alice, Texas. (3 ROA 78, 79).

At this juncture, the agents completed their legitimate immigration function and were then engaged in a criminal investigation to determine the owners or possessors of the suitcases containing the marijuana.

Agent Ramos testified that he and agent Santana knew from the initial routine brief questioning of the bus passengers that Petitioner and her companion were the only passengers going to Alice, Texas. (3 ROA 18). He further testified that he suspected them of possessing the marijuana ladden suitcases and that he had focused his criminal investigation on petitioner. (3 ROA 21, 22, 23). For that reason Agent Ramos re-entered the bus and asked Petitioner if she had any luggage and she replied that she did not. (3 ROA 89). Not satisfied, Agent Ramos removed Petitioner and Ms. Mary Gore from the bus. Agent Ramos again questioned Petitioner and Ms. Gore regarding ownership of the three suitcases suspected of containing marijuana. Petitioner again denied knowledge of the suitcases. (3 ROA 89, 90). The agent then testified that he took Petitioner and Ms. Gore to a private room (the checkpoint office) and again continued his interrogation of her by directing Petitioner and Ms. Gore to produce their bus tickets. (3 ROA 90). Petitioner complied with the agent's instructions, by taking out an envelope and opening it. When she did so, the agent noticed a baggage claim stub. (3 ROA 90). The claim stubs seized by the agent matched those of the three suitcases. Ms. Bengivenga and Ms. Gore were both arrested. (3 ROA 91, 92).

Petitioner was subsequently indicted on February 7, 1986, for possession with intent to distribute 24 kilograms of marijuana in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(c). Ms. Bengivenga filed a Motion

to Suppress the evidence seized from her and the Motion was denied. During the course of the proceedings, the Trial Court acknowledged that "its the most substantial question of law I've seen raised with respect to the checkpoint since I have been on the bench." (3 ROA 137).

The case was tried to a jury which returned a verdict of guilty. Petitioner was sentenced to four years with a five year special parole term and a \$50.00 assessment. (3 ROA 13). Ms. Bengivenga appealed her conviction which was reversed by a panel of the Fifth Circuit in *United States v. Mary Bengivenga*, 811 F.2d. 853 (5th Cir. 1987). The panel used the four-factor test from *United States v. Alvarado*, 781 F.2d 422, 425-26 (5th Cir. 1986) to determine whether Ms. Bengivenga was "in custody" at the time before any *Miranda* warnings were administered. The four-factors are: (1) Whether there was probable cause to arrest; (2) whether the law enforcement officer had a subjective intent to hold the defendant; (3) whether the defendant had a subjective belief that her freedom was significantly restricted; and (4) whether the focus of the investigation was on the defendant at the time of the questioning. The Court stated that the existence of probable cause to arrest, in addition to the fact that the investigation was focused on Petitioner, rendered her answers to the border patrol agent the product of a custodial interrogation. These answers were therefore inadmissible, since no *Miranda* warnings had been issued, prior to Ms. Bengivenga being interrogated.

Following the reversal, the government sought rehearing urging a different standard of review than urged before the panel and raising new issues. In their peti-

tion for rehearing *en banc*, the Government argued that the four-pronged test ought to be abandoned because it was "inconsistent with the pronouncements of the Supreme Court regarding when a situation is custodial in character." (Brief of United States on Rehearing *En Banc*, p. 15). The Government asked that the Fifth Circuit adopt the reasonable man test for determining whether a suspect is in custody. See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) and *United States v. Phillips*, 812 F.2d 1355 (11th Cir. 1987).

An order granting rehearing *en banc* vacated the panel's holding and the conviction was affirmed in *United States v. Mary Bengivenga*, 845 F.2d 593 (5th Cir. 1988).

### REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to define and clarify the meaning of "custody". In the majority *en banc* opinion, the Fifth Circuit abandoned its previous four factor test to determine whether a person is in custody and adopted the reasonable person test. Petitioner does not contend that the reasonable person test is inappropriate, but rather argues that whatever test is used, she was "in custody" before a *Miranda* warning was administered. Petitioner was required to enter a Border Patrol Office accompanied by armed Border Patrol Agents. Petitioner submits that an individual compelled to enter a law enforcement office by law enforcement officers is "in custody". The majority opinion relies heavily on *Berkemer v. McCarty*, 468 U.S. 420 (1984). However, the facts of that case are quite different from those of Ms. Bengivenga.

The Border Patrol Agent asked Ms. Bengivenga while she was in the bus if the luggage was hers and she denied owning the bags. He then removed her from the bus and reasked this question. Once again Ms. Bengivenga denied any connection to the baggage. Prior to the third interrogation, Ms. Bengivenga was required to enter the checkpoint trailer. The Defendant was not free to leave and was placed in an official law enforcement facility. There she was once again questioned before a *Miranda* warning had been issued. Once again, Petitioner denied owning the luggage. Although Ms. Bengivenga had been in custody for only ninety seconds, "the Constitution does not give police officers a free minute and a half to do whatever they wish." *United States v. Bengivenga*, 845 F.2d 593, 604 (5th Cir. 1988) (Goldberg, J. dissenting opinion).

The defendant in *Berkemer*, unlike Ms. Bengivenga, was never removed to a secluded area, some distance from his only mode of transportation. Ms. Bengivenga, however, did not have her own automobile but rather was traveling on a bus with approximately fifteen other passengers. Not only was Petitioner intimidated by the Border Patrol Agents, but the thought of being stranded at a checkpoint trailer at midnight, with nowhere else to go, would be frightening to any individual. All of these facts distinguish *Bengivenga* from *Berkemer*. The reasonable man test is misapplied by the majority in *Bengivenga*. Using the majority interpretation a suspect would only be placed in custody when behind bars, whether this be in a police car or at a police station. When a Border Patrol Agent tells a woman to exit a public bus (her only mode of transportation) and requires her to enter a Border Patrol checkpoint trailer, a reasonable person



would believe that she was not free to go. Since Petitioner was in custody prior to any *Miranda* warnings being given, the illegally obtained evidence should have been suppressed at her trial.

The majority opinion in *Bengivenga* recognized that its analysis of the facts of this case may not withstand scrutiny in this Court and therefore added on a "safety valve" in its opinion entitled "Nontestimonial Evidence And The Fruit Of The Poisonous Tree Doctrine." *United States v. Bengivenga*, 845 F.2d 593, 600 (5th Cir. 1988). When the majority found "that Ms. Bengivenga was not in custody they needed go no further to affirm the conviction." *Id.* at 606 (dissenting opinion). However, the majority found it necessary "to redefine testimony [so as] to exclude the production of [Ms. Bengivenga's] baggage stubs." *Id.*

The method of defining testimony adopted by the majority "is completely inconsistent with the approach adopted in *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976), and followed in *United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984)." *Id.* in *Doe*, the Court held that an individual can refuse to produce documents in his or her personal possession when the act of production would include a testimonial assertion which could be incriminating. This Court also stated in *Doe* that the act of producing the records would have communicative aspects of its own in that the turning over of the records to the grand jury would admit their existence, possession, and authenticity, and that hence the respondent was entitled to assert his Fifth Amendment privilege against compelled self-incrimination rather than produce the records.

Even the government must concede that the baggage stubs obtained from Ms. Bengivenga constituted the essential incriminating link needed to convict her. The baggage stubs would have been meaningless unless they had come from Petitioner. "The act of production of the ticket envelope which contained both the stubs and the ticket was the testimony. It makes no difference that one testimonial act produces two pieces of paper, when the pieces of paper are meaningless if the testimonial act is suppressed." *United States v. Bengivenga*, 845 F.2d 593, 607 (5th Cir. 1988) (dissenting opinion).

### CONCLUSION

The Court of Appeals' holding in *Bengivenga* is in direct conflict with this Court's decision in *Miranda*. Ms. Bengivenga was not administered *Miranda* warnings when she was taken into custody yet her testimonial act was permitted to be used against her. The Fifth Circuit also incorrectly held that her act of producing the incriminating baggage stubs was not testimonial, thus ignoring the holdings of *Fisher* and *Doe*. This case presents this Court with an opportunity to provide further guidelines on the circumstances which constitute custody for purposes of *Miranda*. Petitioner submits that, at a minimum, "custody" must include being required to accompany a law enforcement officer into a law enforcement facility in connection with an ongoing criminal investigation. It

is for these reasons that the petition for a writ of certiorari should be granted.

Respectfully submitted,

---

FRANK M. GARZA  
*Attorney In Charge*  
*For Petitioner*

CANALES & ASSOCIATES, P.C.  
 Attorneys at Law  
 2601 Morgan Ave.  
 P. O. Box 5624  
 Corpus Christi, Texas 78465  
 (512) 883-0601

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing PETITION FOR A WRIT OF CERTIORARI was mailed, certified mail, return receipt requested to Mr. Mervyn Hamburg, Deputy Chief, Appellate Section, Criminal Division, U. S. Department of Justice, P. O. Box 899, Washington, D.C. 20004-0899 on this 6th day of July, 1988.

---

FRANK M. GARZA



1a

**ATTACHMENT A**

UNITED STATES of America,  
Plaintiff-Appellee,

v.

Mary Dangerfield BENGIVENGA,  
Defendant-Appellant.

No. 86-2394.

United States Court of Appeals,  
Fifth Circuit.

May 25, 1988.

Defendant was convicted in the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., of possession of marijuana, and she appealed. The Court of Appeals, Gee, Circuit Judge, 811 F.2d 853, reversed. On rehearing en banc, the Court of Appeals, Clark, Chief Judge, held that defendant was not in custody for *Miranda* purposes until after baggage claim stubs connecting her with marijuana-filled suitcases were discovered, and thus stubs were admissible.

Affirmed.

Alvin B. Rubin, Circuit Judge, concurred in result and filed opinion.

Goldberg, Circuit Judge, with whom Politz, Johnson and Williams, Circuit Judges, joined, dissented and filed opinion.

---

Frank M. Garza, Canales & Associates, Corpus Christi, Tex., for defendant-appellant.

Susan L. Yarbrough, James R. Gough, Asst. U.S. Attys., Henry K. Oncken, U.S. Atty., Houston, Tex., Mervyn Hamburg, Crim. Div., Appellate Section, U.S. Dept. of Justice, Washington D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

CLARK, Chief Judge:

A jury found Mary Dangerfield Bengivenga guilty of possessing marijuana with intent to distribute. A panel of this court reversed the conviction because the district court had denied Bengivenga's motion to suppress evidence obtained before border patrol agents administered *Miranda* warnings.<sup>1</sup> Our order granting rehearing en banc vacated the panel's holding. We now affirm the conviction because Bengivenga was not "in custody" prior to her formal arrest and because, if a *Miranda* violation occurred, that alone would neither require exclusion of nontestimonial evidence nor trigger the derivative evidence rule.

## I. FACTS

On February 1, 1986, shortly after midnight, Border Patrol Agents Santana and Ramos stopped a commercial

---

1. *United States v. Bengivenga*, 811 F.2d 853 (5th Cir. 1987).

bus at a fixed checkpoint located seven miles south of Falfurrias, Texas. Agent Santana boarded the bus at the secondary inspection point to conduct a routine citizenship check of the ten to fifteen passengers while Agent Ramos watched the exits. Two of the passengers, Bengivenga and a female companion, told Agent Santana that they were bound for Alice, Texas, a small town fifty miles north of the checkpoint.

After completing the citizenship check, Agent Santana left the bus to examine the luggage bins for illegal aliens. In the front compartment he detected a strong marijuana odor emanating from three similar suitcases. Agent Ramos confirmed this suspicion and the two agents removed the three suitcases from the luggage bin. The agents inspected the baggage claim tags and discovered that the suitcases were destined for Alice. Throughout this luggage inspection, the agents observed Bengivenga and her companion peering nervously out the bus window.

Santana then informed Ramos that those two women were the only passengers who said they were traveling to Alice. Agent Ramos boarded the bus and first asked two men sitting in front of the women about their destination to determine whether they might be involved in smuggling the marijuana. When the men indicated that they were bound for San Antonio, Ramos proceeded to ask the women their destination and whether they had any luggage. They responded that they were bound for Alice and that they had not checked any luggage. Ramos then requested that they "please" step off the bus for further questioning. Ramos testified that further questioning is customarily done off the bus to avoid embarrassment to the suspect and to ensure the safety of the other passengers.

As they exited the bus, Ramos asked the women whether they owned the three suitcases. The women denied ownership. Ramos and Santana carried the luggage into the checkpoint trailer and requested the two women to accompany them. Agent Santana began filling out a baggage receipt form for the bus driver who was already in the trailer drinking coffee. In response to a question, the women again nervously denied that the suitcases belonged to them. Agent Ramos then requested the women to produce their bus tickets. When Bengivenga opened the envelope containing her ticket, Ramos noticed three baggage claim stubs which he asked to see. After matching the stubs to the baggage claim tags on the suitcases, Agent Ramos arrested the two women, advised them of their constitutional rights and opened the luggage. The agents found twenty-four kilograms of marijuana inside the suitcases.<sup>2</sup> Approximately a minute and a half elapsed between the time the women entered the trailer and the time of their arrest.

---

2. The district court held that the warrantless search of the luggage did not contravene the Fourth Amendment because the Falfurrias checkpoint had been recognized as a functional equivalent of the border. See *United States v. Salinas*, 611 F.2d 128 (5th Cir. 1980). Although this circuit has previously authorized plenary searches at such checkpoints, we recently refused to uphold plenary searches at the Sierra Blanca fixed checkpoint on a functional equivalency of the border theory. *United States v. Jackson*, 825 F.2d 853, 860-62 (5th Cir. 1987) (en banc), cert. denied sub nom. *Ryan v. United States*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 711, 98 L.Ed.2d 661, cert. denied sub nom. *Browning v. United States*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 730, 98 L.Ed.2d 679 (1988). In *Jackson*, we nonetheless declined to suppress any evidence because the deterrence rationale of the exclusionary rule would not be advanced where agents acted in good faith reliance on our prior precedent. *Id.* at 865-66. Without considering whether the search of Bengivenga's luggage might be justified on a theory other than functional equivalency, we simply note that the exclusionary rule would not apply to the marijuana because the agents conducted the search in good faith prior to our decision in *Jackson*. *Id.* at 866.



Before her trial, Bengivenga moved to suppress her statements to the agents, her bus ticket, the baggage claim stubs and the marijuana arguing that she was "in custody" and entitled to *Miranda* warnings prior to being questioned in the trailer. Agent Ramos testified at the suppression hearing that he believed Bengivenga was free to refuse to accompany him to the trailer and he did not possess probable cause to arrest until he examined the baggage claim stubs. The district court denied the motion to suppress. At trial, the prosecution introduced the baggage claim stubs. Agent Ramos also testified at the trial that Bengivenga produced her bus ticket, that he observed baggage claim stubs in Bengivenga's ticket envelope and that he matched the stubs to baggage claim tags on the suitcases containing marijuana.

## II. IN CUSTODY

*Miranda* warnings must be administered prior to "custodial interrogation."<sup>3</sup> The issue in this case is whether Bengivenga was "in custody" prior to producing her bus ticket and baggage claim stubs.

### A. The Four Factor Test

This circuit has considered four factors on a case-by-case basis to determine whether a person is "in custody." These factors are (1) whether there was probable cause

---

3. Absent "other fully effective means" a person subjected to custodial interrogation

must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L.Ed.2d 694 (1966).

to arrest the defendant, (2) whether the investigation was focused on the defendant at the time of interrogation, (3) whether the law enforcement officer had a subjective intent to hold the defendant, and (4) whether the defendant subjectively believed that her freedom was significantly restricted.<sup>4</sup> Custody did not require the presence of all factors,<sup>5</sup> but more than one factor had to be present.<sup>6</sup>

The district court held that Bengivenga was not in custody under this four factor test. First, the district court concluded that probable cause to arrest did not arise until after Bengivenga produced the baggage claim stubs and Agent Ramos matched them to the suitcases. Second, the district court found that the agents subjectively intended to restrict Bengivenga's freedom of movement for only a limited and brief investigation of suspicious circumstances. Third, Bengivenga did not testify at the suppression hearing. The district court also found that the objective facts did not support an inference that Bengivenga believed she was in custody. Finally, although the investigation had focused upon Bengivenga and her companion, the district court held that this factor alone was insufficient to render the interrogation custodial.

---

4. See, e.g., *United States v. Warren*, 578 F.2d 1058, 1071 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956, 100 S. Ct. 2928, 64 L.Ed.2d 815 (1980).

5. See, e.g., *United States v. Jordan*, 557 F.2d 1081, 1093-84 (5th Cir. 1977) (absence of probable cause does not preclude a finding of custody when the other three factors are present); *Alberti v. Estelle*, 524 F.2d 1265, 1267 (5th Cir. 1975) (probable cause plus focus establish custody), cert. denied, 426 U.S. 954, 96 S. Ct. 3181, 40 L.Ed.2d 1193 (1976).

6. See, e.g., *Brown v. Beto*, 468 F.2d 1284, 1286 (5th Cir. 1972) ("none of those factors is alone determinative").

On appeal, the panel held that Bengivenga was in custody before being questioned in the trailer because the agents, in addition to having focused their investigation on the women, had probable cause to arrest. *United States v. Bengivenga*, 811 F.2d 853, 855 (5th Cir. 1987). The panel, unlike this en banc court, was constrained by our past precedent. For the following reasons, we conclude that our four factor custody test is no longer compatible with Supreme Court precedent and must be abandoned in favor of the analysis we adopt today.

### B. The Reasonable Person Test

[1] The *Miranda* Court first defined "custodial interrogation" to "mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>7</sup> The meaning of custody has been refined so "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest."<sup>8</sup> The Supreme Court has also explained that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation."<sup>9</sup> A suspect is therefore "in custody" for *Miranda* purposes when

7. *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612 (footnote omitted); see also *id.* at 477, 478, 86 S. Ct. at 1629, 1630.

8. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L.Ed.2d 714 (1977) (per curiam)); see also *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L.Ed.2d 317 (1984); *Minnesota v. Murphy*, 465 U.S. 420, 430-31, 104 S. Ct. 1136, 1144, 79 L.Ed.2d 409 (1984).

9. *Berkemer*, 468 U.S. at 442, 104 S. Ct. at 3151 (footnote omitted).

placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest. The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances.

### 1. Factoring out the Four Factor Test

Although the task of defining custody can be “a slippery one,”<sup>10</sup> Supreme Court precedent has substantially undermined the four factors comprising our custody test. First, the existence of probable cause to arrest is largely immaterial to the question of custody. In a case holding that traffic stops do not ordinarily place a motorist in custody, the Court rejected the position that custody arises as soon as the level of suspicion amounts to probable cause to arrest. *Berkemer v. McCarty*, 468 U.S. 420, 435 n. 22, 104 S. Ct. 3138, 3148 n. 22, 82 L.Ed. 2d 317 (1984).

The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions. And, by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the [proposed rule] would be extremely difficult to administer.

---

10. *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S. Ct. 1285, 1293, 84 L.Ed.2d 222 (1985).

*Id.* Police officers are not required to effectuate an arrest the moment probable cause arises.<sup>11</sup> Regardless of the presence of probable cause, until an officer acts to exert some type of restraint a suspect cannot reasonably believe her freedom is restrained.

The Supreme Court has also made it clear that focus alone does not create *Miranda* custody.<sup>12</sup> Acknowledging this rule,<sup>13</sup> our cases have held that custody arises when focus is coupled with another factor such as probable cause.<sup>14</sup> Even this approach remains problematic because the exertion of restraint no more accompanies focus than it does probable cause. In particular, the presence of probable cause and focus often adds little to the custody equation because facts that establish these two factors

---

11. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall short of the amount necessary to support a criminal conviction. *Hoffa v. United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 417, 17 L.Ed.2d 374 (1966) (footnote omitted).

12. *Murphy*, 465 U.S. at 431, 104 S. Ct. at 1144 ("[t]he mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings"); see also *Beheler*, 463 U.S. at 1124 & n. 2, 103 S. Ct. at 3519 & n. 2; *Mathiason*, 429 U.S. at 495, 97 S. Ct. at 714; *Beckwith v. United States*, 425 U.S. 341, 347, 96 S. Ct. 1612, 1616, 48 L.Ed.2d 1 (1976).

13. *United States v. Alvarado Garcia*, 781 F.2d 422, 426 (5th Cir. 1986).

14. *Alberti*, 524 F.2d at 1267-68 (criticizing the focus-plus-probable-cause rule).

tend to coalesce.<sup>15</sup> Probable cause and focus become material to the custody inquiry only when they influence a reasonable person's perception of the situation.<sup>16</sup> To consider these factors in any other light may hamper legitimate police practices that do not threaten Fifth Amendment rights.

Finally, both our third and fourth factors—the unrevealed subjective intent of the law enforcement officer and the subjective belief of the suspect—are irrelevant to the custody determination. The Supreme Court recently stated that “[a] policeman’s unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”<sup>17</sup> Consideration of the

---

15. The difficulty with the focus-plus-probable-cause rule is most apparent where undercover agents infiltrate drug rings or other criminal activity. In such circumstances, criminals frequently make incriminating statements in response to questions posed after an agent has probable cause and the investigation has focused on the suspect. We generally have held that such situations provide no basis to infer coercion. *See, e.g., United States v. Marks*, 603 F.2d 582, 584 (5th Cir. 1979) (per curiam) (even if focus and probable cause existed, statements made to undercover agents “were uttered in a context completely free from coercion”), *cert. denied*, 444 U.S. 1018, 100 S. Ct. 673, 62 L.Ed.2d 649 (1980).

16. The *awareness* of the person being questioned by an officer that he has become the “focal point” of the investigation, or that the police already have ample cause to arrest him, may well lead him to *conclude, as a reasonable person*, that he is not free to leave, that *he has* been significantly deprived of his freedom. . . .

Kamisar, “*Custodial Interrogation*” *Within the Meaning of Miranda*, in *Criminal Law and the Constitution* 355, 371 (Inst. for Cont. Educ. 1968) (emphasis in original).

17. *Berkemer*, 468 U.S. at 442; 104 S. Ct. at 3151 (footnote omitted); *see also Murphy*, 465 U.S. at 431, 104 S. Ct. at 1144 (the intent of a probation officer who questions a probationer is immaterial to the custody issue).



subjective belief of the suspect may have an apparent logical soundness because "a person who honestly but unreasonably believes he is in custody is subject to the same coercive pressures" as one whose belief is reasonable.<sup>18</sup> But the Supreme Court adopted a reasonable person test because it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question."<sup>19</sup>

## 2. *Miranda* Custody and Fourth Amendment Seizures

In the past, we have questioned the relationship between *Miranda* custody and the Fourth Amendment's proscription of unreasonable seizures. See, e.g., *United States v. Brunson*, 549 F.2d 348, 356 n. 9 (5th Cir.), cert. denied, 434 U.S. 842, 98 S. Ct. 140, 54 L.Ed.2d 107 (1977). We know that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>20</sup> But a Fourth Amendment seizure does not necessarily hender a person in custody for purposes of *Miranda*. For example, traffic stops—stops which con-

---

18. *Mathiason*, 429 U.S. at 497 n. 1, 97 S. Ct. at 715 n. 1 (Marshall, J., dissenting).

19. *Berkemer*, 468 U.S. at 442 n. 35, 104 S. Ct. at 3151 n. 35 (quoting *People v. P.*, 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 232 (1967)).

20. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (footnote omitted); see also *INS v. Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 1762, 80 L.Ed. 2d 247 (1984).

stitute a Fourth Amendment seizure<sup>21</sup>—do not automatically place a person in custody for purposes of *Miranda*.<sup>22</sup> In *Brunson*, 549 F.2d at 357 n. 12, a panel of this court noted that “the core meaning both of ‘seizure’ in the Fourth Amendment sense, and of ‘custody’ in the *Miranda* sense, appears to be the same: the restraint of a person’s ‘freedom to walk away’ from the police.” The critical difference between the two concepts, however, is that custody arises only if the restraint on freedom is a certain degree—the degree associated with formal arrest.

### C. Application of the Reasonable Person Test

A stop at a fixed checkpoint constitutes a Fourth Amendment seizure<sup>23</sup>—a reasonable person would believe that she was not free to leave. *Bengivenga* was seized from the time that her bus was stopped at the checkpoint until her arrest, but her situation, as understood by a reasonable person, did not at any time prior to production of the baggage claim stubs involve a degree of restraint associated with formal arrest.

#### 1. Routine Citizenship Checks at Fixed Checkpoints

[2] Routine citizenship checks at fixed checkpoints are characterized by the same two features important to *Berkemer’s* holding that an ordinary traffic stop does not

21. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L.Ed.2d 660 (1979) (“stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief”).

22. *Berkemer*, 468 U.S. at 440, 104 S. Ct. at 3150.

23. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082, 49 L.Ed.2d 1116 (1976).



render a motorist in custody. First, traffic stops are "presumptively temporary and brief." *Berkemer*, 468 U.S. at 437, 104 S. Ct. at 3149.

The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.

*Id.* Stationhouse interrogation, on the other hand, frequently may be prolonged and a reasonable person might expect questioning to continue "until he provides his interrogators the answers they seek." *Id.* at 437-38, 104 S. Ct. at 3149. Second, traffic stops are less "police dominated" than stationhouse interrogations. *Id.* at 438-39, 104 S. Ct. at 3149-50. The public nature of traffic stops reduces the hazard that police might resort to overbearing means to elicit incriminating responses and diminishes the motorist's fear of abuse by the police if he fails to cooperate. *Id.* at 438, 104 S. Ct. at 3149. That no more than one or two police officers usually participate in a traffic stop also mitigates a motorist's sense of vulnerability. *Id.*

A routine checkpoint stop involves "brief detention," limited questioning and possibly production of a relevant document.<sup>24</sup> The degree of restraint associated with arrest is

---

24. *Id.* 428 U.S. at 558, 96 S. Ct. at 3083. Government statistics indicate that "the average length of an investigation in the secondary inspection area [at the San Clemente checkpoint] is three to five minutes." *Id.* at 546-47, 96 S. Ct. at 3078. Agent Ramos testified that citizenship checks on buses usually take "thirty seconds to five minutes," depending on the number of passengers.

more enduring and less circumspect. A fixed checkpoint mitigates the "subjective" fear a reasonable person might otherwise experience when their vehicle is stopped by border patrol agents. *Id.* at 558-59, 96 S. Ct. at 3083. Fixed checkpoints do not take travelers "by surprise as they know, or may obtain knowledge of, the location of checkpoints and will not be stopped elsewhere." *Id.* at 559, 96 S. Ct. at 3083. The law enforcement presence at a fixed checkpoint actually assuages the reasonable person's perception of restraint: "The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest." *Id.* Even for those travelers directed to secondary inspection points, "[t]he objective intrusion of the stop and inquiry . . . remains minimal." *Id.* at 560, 96 S. Ct. at 3084. Like a traffic stop, routine citizenship checks usually take place in the view of other travelers and are usually conducted by one or two officers. Routine citizenship checks at fixed checkpoints do not impose a degree of restraint associated with arrest because the detention is by nature brief and subject to the scrutiny of other travelers, the intrusion is limited in scope, advance notice obtains and visible signs of authority mitigate rather than enhance the perceived degree of restraint. Bengivenga therefore was not in custody at the time Agent Santana questioned her on the bus.

## 2. Investigation of Drug Smuggling

[3] Once the agents discovered the suitcases suspected of containing marijuana, their activity shifted from a routine checkpoint stop aimed at detecting illegal aliens to an investigation of drug smuggling. That Bengivenga

and her companion were the only passengers destined for the same town as the suitcases which smelled of marijuana coupled with their nervous behavior during the search of the luggage bins made them prime suspects. But the agents, believing that they did not possess probable cause, engaged in further conduct more analogous to a noncustodial investigative stop than a formal arrest.

Officers possessing reasonable articulable suspicion of a person's participation in criminal activity may seize the suspect in accord with the Fourth Amendment to conduct an investigative stop—a narrow intrusion involving limited detention accompanied by brief questioning and, if justified, a frisk for weapons.<sup>25</sup> Such investigative stops do not render a person in custody for purposes of *Miranda*. *Berkemer*, 568 U.S. at 439-40, 104 S. Ct. at 3150. When Agent Ramos boarded the bus and asked the two women their destination and whether they had any luggage, he was conducting a non-custodial investigation. The women's answers did not completely allay his suspicion because they reconfirmed that their destination coincided with the destination of the luggage. Neither did the questions asked at this time exhaust the permissible scope of investigative questioning. In accord with a policy designed to assure the safety of the agents and the other passengers, Ramos requested the women to exit the bus. As in *Berkemer*, 468 U.S. at 441-42, 104 S. Ct. at 3151, where an officer asked a motorist to step out of his car and to perform a sobriety test, simply asking passengers to step off a bus and inquiring about ownership of luggage does not render a suspect in custody.

---

25. See *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L.Ed.2d 889 (1968), and its progeny.

The agents then escorted Bengivenga and her companion to the nearby checkpoint trailer to continue the questioning. Several factors counteract the effect that moving a suspect from a bus to a building maintained by law enforcement personnel would ordinarily have on a reasonable person's perception of the situation and the degree of restraint imposed. First, the trailer was only a short distance from the bus. Second, the conduct of the agents remained subject to the public scrutiny to the extent that the bus driver was actually present in the trailer drinking coffee. The agents did not completely isolate the women in an interrogation room. Third, the number of agents did not increase. Only five people were present in the trailer—the bus driver, the two women and the two agents. Changing the locus of the questioning to the trailer had the advantage of eliminating the potentially embarrassing presence of other bus passengers. With Agent Santana preoccupied with completing a baggage receipt form for the bus driver, it was unlikely that the agents might team up to overbear Bengivenga's will.<sup>26</sup> Finally, a reasonable person in Bengivenga's position would have understood that so long as the bus driver remained in the trailer the bus would not depart and if everything checked out she would shortly rejoin the other passengers on the bus.

Other than being moved to the nearby trailer, the objective facts do not indicate that the border agents imposed a degree of restraint associated with formal arrest. The agents did not communicate the basis for their suspicions. Their reluctance to assert restraint stemmed from their belief that they did not possess probable cause

---

26. Compare *Berkemer*, 468 U.S. at 438 n. 27, 104 S. Ct. at 3149 n. 27.

until after they matched the baggage claim stubs to the three suitcases. At no time during the minute and a half that elapsed in the trailer before formal arrest was Bengivenga given any reason to believe that her detention would be other than temporary. Nor did the nature of the questioning intensify once inside the trailer. The incriminating baggage claim stubs inadvertently surfaced in response to a request to see Bengivenga's bus ticket, a question likely to be routinely asked of any bus passenger who becomes the object of an investigative stop. Rather than successive confrontations with the border agents, Bengivenga was subjected to no more than a routine citizenship check that quickly progressed from an investigative stop to her formal arrest. At no time prior to production of the baggage claim stubs did this situation, as understood by a neutral and reasonable person in Bengivenga's position, involve the degree of restraint associated with formal arrest.

### III. NONTESTIMONIAL EVIDENCE AND THE FRUIT OF THE POISONOUS TREE DOCTRINE

Assuming Bengivenga was in custody at the time of the interrogation in the trailer, we would affirm her conviction because a *Miranda* violation would not require suppression of the evidence introduced at her trial.

#### A. Nontestimonial Evidence

[4] The privilege against self-incrimination "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408, 96 S. Ct. 1569, 1579, 48 L.Ed.2d 39 (1976) (emphasis in original). This privilege ordinarily does not apply to nontestimonial evidence.

See, e.g., *Schmerber v. California*, 384 U.S. 757, 764, 86 S. Ct. 1826, 1832, 16 L.Ed.2d 908 (1966) (suspect may be compelled to supply incriminating blood samples). A violation of *Miranda* rules, rules fashioned to secure the Fifth Amendment's privilege during custodial interrogation,<sup>27</sup> necessitates only the exclusion of testimonial evidence from the prosecution's case in chief.<sup>28</sup> The bus ticket and baggage claim stubs are nontestimonial physical evidence and would not be excludable even if they had been obtained in violation of *Miranda*.

Bengivenga also urges that her acts of producing the bus ticket and baggage claim stubs constitute statements for *Miranda* purposes. We hold, however, that Bengivenga's act of producing her bus ticket is not a statement for *Miranda* purposes. Every passenger on the bus must purchase a ticket. The implicit admission of the existence and possession of a bus ticket that accompanies the act of its production does not rise "to the level of testimony within the protection of the Fifth Amendment" because existence and possession of a bus ticket are a "foregone conclusion." *Fisher*, 425 U.S. at 411, 96 S. Ct. at 1581.

Whether the act of producing the baggage claim stubs could be a statement for *Miranda* purposes in some other context is beside the mark for the prosecution independently established the existence and possession of the stubs. As Bengivenga produced her bus ticket, an act we hold to be nontestimonial, Agent Ramos observed baggage claim stubs inside her ticket envelope. The fact

---

27. *Miranda v. Arizona*, 384 U.S. 436, 458, 86 S. Ct. 1602, 1619, 16 L.Ed.2d 694 (1966).

28. See *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S. Ct. 1285, 1292, 84 L.Ed.2d 222 (1985).



that Bengivenga complied with the subsequent request by Agent Ramos to produce those stubs does not alter the nontestimonial nature of his observations. At trial, Agent Ramos testified only to the observations she made before Bengivenga produced the baggage claim stubs and to the fact that he linked those stubs to the suitcases containing marijuana. The prosecution thereby established the existence of the stubs and their possession by Bengivenga without reference to how they were produced.

### B. *The Fruit of the Poisonous Tree Doctrine*

[5] Even nontestimonial evidence, according to Bengivenga, must be suppressed if it is tainted by custodial interrogation that occurs in violation of *Miranda*. This contention is contrary to the rule that a mere violation of *Miranda's* "prophylactic" procedures does not trigger the fruit of the poisonous tree doctrine. The derivative evidence rule operates only when an actual constitutional violation occurs as where a suspect confesses in response to coercion.<sup>29</sup> None of the tactics employed by the agents were "so offensive to a civilized system of justice that they must be condemned." *Miller v. Fenton*, 474 U.S. 104, 109, 106 S. Ct. 445, 449, 88 L.Ed.2d 405 (1985). Agent Ramos politely requested Bengivenga and her companion to accompany him to the nearby checkpoint trailer where they were questioned for about a minute and a half. Bengivenga remained resolute throughout her entire encounter with the agents, she never admitted ownership of the suitcases. None of the evidence introduced at Bengivenga's trial should have been excluded under

---

29. See, e.g., *Id.* 470 U.S. at 305-309, 105 S. Ct. at 1291-93 (successive confessions); *United States v. Cherry*, 759 F.2d 1196, 1209 & n. 20 (5th Cir. 1985) (derivative physical evidence).

the derivative evidence rule because the record is simply barren of any evidence of coercion.<sup>30</sup>

#### IV. CONCLUSION

The agents were not required to administer *Miranda* warnings before questioning Bengivenga. At no point prior to production of the baggage claim stubs was she in custody. Even if Bengivenga was placed in custody upon entering the checkpoint trailer, the evidence introduced at trial should not have been suppressed because it was nontestimonial and the derivative evidence rule was not triggered by an actual constitutional violation. For these reasons the conviction appealed from is

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurring:

*I concur in the result and all of the opinion except Part III, which discusses an issue that we need not now decide.*

GOLDBERG, Circuit Judge, with whom POLITZ, JOHNSON and WILLIAMS, Circuit Judges, join dissenting:

Today the majority chooses to reject this Circuit's longstanding test for determining whether a suspect is

---

30. Compare *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed.2d 290 (1978) (four hour interrogation of sedated defendant in an intensive-care unit elicited involuntary statements); *Davis v. North Carolina*, 384 U.S. 737, 86 S. Ct. 1761, 16 L.Ed.2d 895 (1966) (sixteen days of incommunicado interrogation and coercive tactics designed to undermine alibi elicited involuntary statements).



in custody.<sup>1</sup> Judge Clark's fine opinion has convinced me that the Supreme Court has specifically rejected each element of our old four part test, and mandated an objective standard. I dissent, not because I would disinter the old test, but instead because I disagree with the majority's application of their newly fashioned standard. The rejection of the four part test is merely a change in technique. My concern is that the new standard be applied in a manner that is consistent with the underlying constitutional and prophylactic principles stated in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

The majority states, and I agree, that a person is in custody when the police have imposed a restraint on liberty of a degree a reasonable person would associate with an arrest. To my mind, however, applying this standard, Ms. Bengivenga was in custody from the moment that she crossed the threshold of the checkpoint trailer. From that moment forward, a reasonable person would have found the circumstances indistinguishable from a formal arrest, and the inherently coercive aspects of custodial questioning came into play. I also disagree with the majority's conclusions that the Fifth Amendment exclusionary rule does not apply because the baggage claim stubs were non testimonial in and of themselves, and, that they cannot be excluded as fruit of a poisoned tree, because there was only a *Miranda* violation, not a constitutional violation. It was the act of producing the ticket and the baggage stubs that was testimonial, not the

---

1. *United States v. Alvarado Garcia*, 781 F.2d 422 (5th Cir. 1986); *United States v. Warren*, 612 F.2d 887 (5th Cir.) (en banc), cert. denied, 446 U.S. 956, 100 S. Ct. 2928, 64 L.Ed.2d 815 (1980); *United States v. Henry*, 604 F.2d 908, 915 (5th Cir. 1979); *Brown v. Beto*, 468 F.2d 1284, 1286 (5th Cir. 1972).

documents themselves, and that act of production occurred in an inherently coercive context. Without the act of production to link the ticket stubs to Ms. Bengivenga, the stubs themselves were meaningless.

## I. THE HALLMARKS OF CUSTODY

### A. *Inherent Coercion*

The Fifth Amendment guards only against coerced confessions. In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), however, the Court noted the natural tendency of custodial interrogation to overbear the will of suspects, saying, "Even without employing brutality, [or] the 'third degree[,]'. . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455, 86 S. Ct. at 1617-18. Because of this inherent coercion we now apply a conclusive presumption that evidence produced by custodial interrogation was coerced, unless the suspect was informed of his rights. 384 U.S. at 478, 86 S. Ct. at 1630.

Today the majority fashions and applies a new standard for determining whether a suspect is in custody. In determining how to apply that standard, a page of history may be worth a pound of logic. We must look to the concerns that informed *Miranda* to determine when a factual situation contains those elements of inherent coercion that led the court to require *Miranda* warnings.

### B. *Privacy and Duration*

The *Miranda* Court carefully examined police practices and focused on certain elements inherent in custody

that rendered it coercive. In police manuals current at the time, two elements were noted to be particularly effective at overbearing the will of a suspect: privacy and the prospect of questioning for an indefinite period.

First, the Court noted the efficacy of privacy saying:

The officers are told by the manuals that the "principal psychological factor contributing to successful interrogation is privacy—being alone with the person under interrogation."

*Id.* at 449, 86 S. Ct. at 1615 (quoting Inbau & Reid, *Criminal Interrogation and Confessions* 1 (1962)). The Court noted that the manuals further advised:

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his own home. Moreover, his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.

*Id.* (quoting O'Hara, *Fundamentals of Criminal Investigation* 99 (1956)).

Second, the Court noted that the manuals focused on the prospect of indefinite interrogation. They encouraged the investigator to be "patien[t]," and to "persever[e]":

Where emotional appeals are employed to no avail, [the investigator] must rely on an oppressive at-

mosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease.

*Id.* at 451, 86 S. Ct. at 1615 (quoting O'Hara at 112).

Both privacy and the prospect of indefinite interrogation were the hallmarks of custodial interrogation which led the Court to apply a conclusive presumption to custodial interrogation, saying that:

Without proper safeguards the process of in custody interrogation of persons suspected or accused of crimes contains inherently compelling pressures which work to undermine the individual's will to resist and, to compel him to speak where he would not otherwise do so freely.

*Id.* at 467, 86 S. Ct. at 1624. The Court therefore held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way," that individual must be advised of his constitutional rights. *Id.* at 478, 86 S. Ct. at 1630.

Determining why a suspect must receive *Miranda* warnings only begins the inquiry into when and under what circumstances such warnings are necessary. The majority takes note of these whys, but comes to an erroneous conclusion about when. They note the importance of privacy and indefinite duration, but fail to see that these hallmarks of inherently coercive custody are present in the factual situation of this case.

## II. DEFINING CUSTODY BY REFERENCE TO INHERENT COERCION

As the majority explains, not all Fourth Amendment seizures constitute custody. For example, a traffic stop

constitutes a seizure, but does not entitle a suspect to *Miranda* warnings. Similarly, a police officer may ask an airline passenger for his or her ticket on the main concourse of the airport or in the baggage claim area, without that individual being deemed in custody.<sup>2</sup> A suspect's freedom must be more than restricted. It must be restricted in a "significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. The "restraint" must be "of the degree associated with a formal arrest." *Berkemer v. McCarty*, 468 U.S. at 440, 104 S. Ct. at 3150, 82 L.Ed.2d 317 (1984).

This distinction between seizure and custody creates a necessarily circular inquiry. Custody is defined not by any extrinsic characteristic. The locution "restraint of the degree associated with formal arrest" does little more than establish the distinction. It does not draw the line. The majority quite properly seeks a way out of this conundrum by looking to the dangers of custody highlighted in *Miranda*. They focus on privacy and the prospect of indefinite duration, but draw the line in a way that leaves the Fifth Amendment at the mercy of police discretion.

#### *A. The Hallmarks of a Non-Custodial Seizure*

To understand where the majority's analysis goes awry requires a careful understanding of the relationship between *Miranda* and the more recent case of *Berkemer v. McCarty*, 468 U.S. at 420, 104 S. Ct. at 3138. The majority treats the questioning of Ms. Bengivenga as an

---

2. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (traffic stop); *United States v. Gonzales*, 842 F.2d 748 (5th Cir. 1988) (airline ticket).

ordinary traffic stop. In *Berkemer*, the Supreme Court noted, as we have already, that:

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced to speak where he would not otherwise to do freely. . . . First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. . . . In this respect, questioning incident to an ordinary traffic stop is quite different from station-house interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides the interrogators the answers they seek.

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. . . . Most importantly, the typical traffic stop is public. . . . Passersby, on foot or in other cars witness the interaction of the officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subject to abuse.

*Id.* at 437-39, 104 S. Ct. at 3149.

The Court was particularly concerned that if these two factors should evaporate the traffic stop would lose its non-custodial character. Otherwise, traffic stops "might open the way to widespread abuse. Policemen [might] simply delay formally arresting detained motorists, and . . . subject them to sustained and intimidating interrogation at the site of their initial detention." *Id.* at 440, 104 S. Ct. at 3150. To prevent this, the court emphasized



that "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protection prescribed by *Miranda*." *Id.* The Court specifically eschewed a per se rule that traffic stops are non-custodial, and pointed out that, "police and lower courts will continue occasionally to have difficulty deciding when a suspect has been taken into custody." *Id.* at 441, 104 S. Ct. at 3151.

*B. A Non-Custodial Seizure With All the  
Hallmarks of Custody?*

The majority takes great pains to demonstrate that this particular border stop was both public and brief. I cannot agree. The *Berkemer* Court pointed out that when a traffic stop takes place on the street, the presence of passersby guards against actual police misbehavior and undercuts the police dominated environment. This characteristic of a traffic stop disappeared as soon as Ms. Bengivenga was escorted to the trailer. Ms. Bengivenga was isolated from view of her fellow travelers on the bus and from other travelers who might pass through the checkpoint. It was midnight, and if the bus left, she would be left in an unfamiliar place at least till morning. Granted, she was not taken into an interrogation room, and the bus driver was present when Ms. Bengivenga produced the ticket. Still, the questioning in the trailer was in no way akin in its public character to questioning, on a public thoroughfare open to the plain view of all who should happen to pass by. Furthermore, Ms. Bengivenga was not driving her own car, nor was she capable of leaving under her own power at the close of questioning.

The majority also argues that this interrogation took only a minute and a half, and was therefore brief. To rely upon a stop watch to make this sensitive and subtle determination is not the correct approach. The phrase used by the Supreme Court in *Berkemer*, was "presumptively temporary and brief." *Berkemer*, 468 U.S. at 437, 104 S. Ct. at 3149. I cannot see how the fact that it only took ninety seconds for Ms. Bengivenga to produce incriminating evidence after being brought to the trailer suggests that a reasonable person once brought to a checkpoint trailer would expect brief detention. Although the actual length of questioning is relevant to whether Ms. Bengivenga's will was actually overborn, it has no relevance to the inherent coerciveness of the situation. Indeed, it may indicate just how coercive the situation was. The Constitution does not give police officers a free minute and a half to do whatever they wish. As the Court pointed out in both *Berkemer* and *Miranda*, the coercion of custodial interrogation comes not from the actual length of the interrogation, but from a recognition that the police will hold a suspect until they get answers to their questions. 468 U.S. at 438, 104 S. Ct. at 3149, 384 U.S. at 451, 86 S. Ct. at 1615-16.

The majority notes that citizenship checks, even once the individual is moved to a secondary checkpoint, take, on the average, three and a half minutes. They make, however, the unwarranted further assumption that the same presumption of brevity applies to border searches for drugs. Unlike a citizenship check, which is necessarily brief, either the individual can prove citizenship, or he cannot, a drug related detention may take much longer, even in the absence of probable cause. At the time of this



case, plenary border searches were allowed in this Circuit,<sup>3</sup> and the Supreme Court has held that extended detention at the border without sanitary facilities is permissible when based on reasonable suspicion of drug smuggling. *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L.Ed.2d 381 (1985) (sixteen hours). See also, *United States v. Oyekan*, 786 F.2d 832, 833-34, 836 (8th Cir. 1986) (four hours). A reasonable, though innocent, person in Ms. Bengivenga's position could therefore have feared that her stay in the checkpoint trailer would last quite a long time.

For these reasons, I believe that the character of the questioning changed as soon as Ms. Bengivenga was moved from the area outside the bus to the checkpoint trailer. At that point the questioning was no longer public, and there was the prospect of extended interrogation. The majority's analysis takes a long first step toward allowing police officers to blur the line, between a brief traffic stop and custodial detention, that was central to the Court's opinion in *Berkemer*.

I also object for another reason. By declaring this search non-custodial, the majority misses an opportunity to clarify the law. Every police officer must determine for himself when a traffic stop becomes custodial. The burden is always on the police to show that evidence is admissible and that a confession is voluntary. However, *Berkemer* tells us that so long as the stop is on the street, and short, it is presumptively non-custodial. To my mind, that pre-

---

3. *United States v. Jackson*, 825 F.2d 853, 860-62 (5th Cir. 1987) (en banc), cert. denied sub nom., *Ryan v. United States*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 711, 98 L.Ed.2d 661, cert. denied sub nom., *Browning v. United States*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 730, 98 L.Ed.2d 679 (1988).

sumption ends as soon as the suspect is removed from the public thoroughfare to a squad car, checkpoint trailer or station house. To reestablish a presumption of voluntariness, the police must inform the suspect of his rights, or of the fact that he is not under arrest.<sup>4</sup>

The majority, however, leaves it unclear what factors are dispositive in this case. Does entering the trailer matter at all? Is the presence of the bus driver in the trailer dispositive? I would simplify matters and hold that when a suspect is moved to a secondary checkpoint on suspicion of drug smuggling (as distinct from a citizenship check), he or she is in custody and should be informed of his or her rights. Even if one does not adopt such a per se rule, I believe that Ms. Bengivenga, purely on the facts of this case, was in custody.<sup>5</sup>

---

4. This position does not conflict with either *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977), or *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983). Both of these cases deal with station house questioning, where the suspect voluntarily agreed to accompany officers to the police station. In both cases, the suspect was specifically informed that he was not under arrest, and in both cases the suspects actually did leave the station house within half an hour. 429 U.S. at 492, 494, 97 S. Ct. at 711, 713; 463 U.S. at 1122, 103 S. Ct. at 3518.

5. The Ninth Circuit applies an objective standard as well, but they have articulated some of the factors which contribute to an objectively reasonable belief that custody has begun. They examine four factors: 1) the officer's language in summoning the suspect; 2) the physical surroundings of interrogation; 3) the extent to which the accused is confronted with evidence of his guilt; and 4) the amount of pressure exerted. Applying this standard, the Ninth Circuit has held that the objective circumstances surrounding a customs inspection were sufficient to constitute custody, where the suspect was confronted with evidence of illegally imported merchandise and was not told that she was free to leave. *United States v. Estrada-Lucas*, 651 F.2d 1261, 1266 (9th Cir. 1980).

*Estrada-Lucas* suggests that, at least in the Ninth Circuit, the context surrounding the questioning of Ms. Bengivenga would have been held to constitute custody under an objective standard.

### III. TESTIMONY?

Because the majority finds that Ms. Bengivenga was not in custody, they needed go no further to affirm the conviction. Still, they reach out to redefine testimony to exclude the production of baggage stubs. In so doing they misread the primary case they cite for support. The majority argues that production of the ticket was non-testimonial, because all passengers carry tickets. In so doing, they focus on the content of the requested papers. This is completely inconsistent with the approach adopted in *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976), and followed in *United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984).

*Fisher* rejected the approach followed in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746 (1886), which focussed on the content of a requested document. *Fisher* held that the Fifth Amendment applies only to the act of production. The issue is whether the act of producing a document conveys sufficient information to be considered testimonial. The Court said:

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the content of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. . . . The elements of compulsion are clearly present but the more difficult issues are whether the tacit averment of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amend-

ment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases.

*Id.* 425 U.S. at 410, 96 S. Ct. at 1581. In *Fisher* the existence, possession and control of the requested documents were not an issue. Production of the documents conveyed no information in and of itself. However, the Court stated that an act of production that did convey information would be testimonial.

This approach was followed in *United States v. Doe*, 465 U.S. 605, 104 S. Ct. 1237, 79 L.Ed.2d 552 (1984), where the district court held that requiring defendant to produce the business records of a sole proprietorship would force him to admit that the documents existed, that they were in his possession and that they were authentic. The Supreme Court concluded that defendant could not be compelled to produce those records.

This case is indistinguishable from *Doe*. The police knew that the seized luggage contained drugs, but they needed something to link them to Ms. Bengivenga. Baggage stubs alone do not suffice to link a person to a bag. The baggage stubs must be in possession of the suspect to convey any information at all. Where as here, the physical evidence would be meaningless without the physical act of production, that act must be deemed testimonial.

The majority further attempts to distinguish production of the ticket from production of the ticket stubs. Without doubt, production of the ticket itself was testimonial, as defined in *Fisher*. The agent requested the ticket and Ms. Bengivenga produced it. Possession of a ticket to

Alice confirmed that Ms. Bengivenga was indeed going to Alice, the destination of the marijuana laden suitcases. In the ticket envelope were baggage stubs that linked Ms. Bengivenga to the suitcases. The majority's focus on the content of the documents produced causes them to mistakenly treat the stubs as a fruit of the tainted testimony rather than as the testimony itself. The act of production of the ticket envelope which contained both the stubs and the ticket was the testimony. It makes no difference that one testimonial act produced two pieces of paper, when the pieces of paper are meaningless if the testimonial act is suppressed.

\* \* \* \*

It is, therefore, with great regret that I dissent from the majority opinion, the author of which has earned, over the years, my respect for both his analysis and judgment. In this case, however, I am forced to conclude that a reasonable person, in Ms. Bengivenga's position, would have felt compelled to answer any questions put to her by the officers, unless apprised in advance of her constitutional rights, and that the act of producing the ticket and baggage stubs conveyed enough information to be deemed testimonial.

On this rationale I would reverse Ms. Bengivenga's conviction.

**ATTACHMENT B**

UNITED STATES of America,  
Plaintiff-Appellee,

v.

Mary Dangerfield BENGIVENGA,  
Defendant-Appellant.

No. 86-2394.

United States Court of Appeals,  
Fifth Circuit.

Feb. 23, 1987.

Defendant was convicted before the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., of a marijuana offense, and she appealed. The Court of Appeals, Gee, Circuit Judge, held that existence of probable cause to arrest defendant in addition to fact that investigation had focused on her rendered her answers to questions of border patrol agent the product of custodial interrogation, and she was entitled to protection of *Miranda* warnings before agent questioned her.

Reversed.

Clark, Chief Judge, dissented with opinion.

Frank M. Garza, Canales & Associates, Corpus Christi, Tex., for defendant-appellant.

Henry K. Oncken, U.S. Atty., Susan L. Yarbrough, James R. Gough, Asst. U.S. Attys., Houston, Tex., for plaintiff-appellee.



Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

Mary Dangerfield Bengivenga challenges the introduction of evidence the police elicited from her before giving *Miranda* warnings. Because we find the police had probable cause to arrest Ms. Bengivenga before they questioned her, we reverse her conviction and order the tainted evidence suppressed.

Ms. Bengivenga's present tribulations began one night shortly after midnight at the border checkpoint seven miles south of Falfurrias, Texas, on U.S. Highway 281.<sup>1</sup> The commercial bus on which she and her female companion were traveling was stopped at the checkpoint by Border Agents Santana and Ramos. Agent Santana boarded the bus for a routine check of the passengers' citizenship. This questioning revealed that all of the ten to fifteen travelers were in the country legally. During this initial questioning, Ms. Bengivenga and her companion volunteered that they were bound for Alice, Texas, a small town 50 miles north of the checkpoint. Agent Santana then left the bus to check the luggage bins for illegal aliens. In the front compartment he found among the seven or eight pieces of luggage three suitcases that smelled strongly of marijuana. Agent Ramos agreed with him that the three similar suitcases contained marijuana. They removed the suitcases and checked the baggage

---

1. This checkpoint is recognized as the functional equivalent of the border. See *United States v. Salinas*, 611 F.2d 128 (5th Cir. 1980).

tags. The suitcases had no identification, but the baggage claims indicated that they were checked through to Alice.

During their inspection of the luggage, Ms. Bengivenga and her friend peered nervously out the window and watched the agents' actions closely. The agents conferred briefly, and Ramos testified that Santana told him that those two women were the only passengers traveling to Alice.<sup>2</sup> Agent Ramos then reboarded the bus and questioned two males sitting in front of the two women as to their destination. They replied that they were going to San Antonio. Agent Ramos then asked the women their destination, and they answered "Alice." He next asked them if they had any luggage, which they denied. With this, he asked them to step off the bus.

After leaving the bus, in response to further questions, they specifically denied that the marijuana-laden suitcases were theirs. Agent Ramos escorted the two into the trailer, while the bus remained at the checkpoint. Both women were very nervous and repeatedly denied ownership of the suitcases. He asked them to produce their bus tickets. When Ms. Bengivenga opened the envelope containing her ticket, Agent Ramos noticed baggage claim stubs in it. He asked to see the stubs. They matched the claim tags on the suitcases, and he then placed the two women under arrest and advised them of their constitutional rights. The entire questioning in the trailer took only about a minute and a half.

---

2. Agent Ramos testified that it was his practice to question passengers as to both citizenship and destination, and he assumed that Agent Santana had done so. Agent Santana testified that he did not ask the passengers their destinations, but that the women and a few others volunteered this information. In any event, based on information from Agent Santana, Agent Ramos believed that the two women were the only passengers bound for Alice.



[1] The appellant argues that she was entitled to *Miranda* warnings before the agents questioned her in the trailer. The question is whether she was in custody during the interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 435, 104 S. Ct. 3138, 3148, 82 L.Ed.2d 317, 331 (1984). The answer depends on the result of applying a four-factored test: (1) whether there was probable cause to arrest; (2) whether the law enforcement officer had a subjective intent to hold the defendant; (3) whether the defendant had a subjective belief that her freedom was significantly restricted; and (4) whether the focus of the investigation was on the defendant at the time of questioning. *United States v. Alvarado Garcia*, 781 F.2d 422, 425-26 (5th Cir. 1986).

[2] We first note that of the four factors, "the most compelling is whether or not the focus of the investigation has finally centered on the defendant." *Brown v. Beto*, 468 F.2d 1284, 1286 (5th Cir. 1972) (footnote omitted); see *United States v. Ledezma-Hernandez*, 729 F.2d 310, 313 (5th Cir. 1984). The agents candidly admitted that they had focused their investigation on Ms. Bengivenga and her friend when they discovered that the suitcases were bound for Alice. Focus in the absence of the other three factors, however, is "insufficient to render the interrogation custodial." *Alvarado Garcia*, 781 F.2d at 426. In this case, however, the conclusion is unavoidable that the officers had probable cause to arrest the appellant before the interrogation in the trailer commenced.

"Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed."

*United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir. 1985). The situation here presents a twist on the ordinary probable cause case, which revolves around the adequacy of police knowledge of a crime. Here the border agents were in no doubt that a crime was being committed; the only question was which passengers were committing it.

We must look at the totality of the circumstances. *Id.* Agent Ramos knew that the three suitcases were checked through to Alice. He believed that only two of the ten or fifteen passengers were headed for Alice, a small town up the road, and he knew that these two women appeared nervous. "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Brinegar v. United States*, 338 U.S. at 160, 175, 69 S. Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949); see also *United States v. Preston*, 608 F.2d 626, 632 (5th Cir. 1979) (quoting *Brinegar*), cert. denied, 446 U.S. 940, 100 S. Ct. 2162, 64 L.Ed.2d 794 (1980). In these circumstances, we must conclude that Agent Ramos had probable cause to arrest the appellant before he questioned her in the trailer.

[3] The existence of probable cause to arrest in addition to the focused investigation on Ms. Bengivenga renders her answers to Agent Ramos' questions the product of custodial interrogation. She was entitled therefore to the protection of *Miranda* warnings before the agent questioned her. Her answers to the questions and the production of her ticket and baggage claim stubs must be suppressed as the product of her unconstitutional interrogation. We therefore REVERSE her conviction.

CLARK, Chief Judge, dissenting:

With deference, I respectfully dissent. I cannot conclude that the record requires that we reverse the district court's factual determination that Agent Ramos did not have probable cause to arrest Bengivenga before he took a minute and a half to determine that she had lied about having checked luggage on the bus. It was entirely appropriate, in my view, for Agent Ramos to take an extra moment to pursue the strongest clue he had by questioning the only two passengers bound for the destination shown on the luggage that smelled of marijuana. It is both plausible and probable, to my mind, for him to think that he needed to confirm that others had not sent the luggage to this small town with the intent that confederates would claim it, or to think that another passenger might have covered his association with the bags by purchasing a ticket to another destination.

Apprehending dope smugglers is not an easy game or one played by logical rules. Agents set to this task frequently find their best efforts thwarted when they make arrests based on what courts later say was less than probable cause. I simply cannot fault Agent Ramos or the district court for holding the belief that I share—until Bengivenga's lie was revealed, a reasonable probability existed that the marijuana-laden suitcases could be in the control of others.

Because I would affirm, I dissent.

**ATTACHMENT C**

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

**DOCKET NO. C-86-00033-01**

**UNITED STATES OF AMERICA**

**v.**

**MARY DANGERFIELD BENGIVENGA  
5106 McDermott Dr.  
Houston, TX**

**(Filed May 23, 1986)**

**JUDGMENT AND PROBATION/  
COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date, May 20, 1986, with counsel Frank M. Garza pleading not guilty.

There being a verdict of guilty on 4-16-86.

Defendant has been convicted as charged of the offense of violations of Title 21, United States Code, Sections 841(a)(1) & (b)(1)(C), POSSESSION WITH INTENT TO DISTRIBUTE APPROX. 24 KILOGRAMS OF MARIHUANA. OFFENSE OCCURRED 2-1-86.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or ap-

peared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS and a Special Parole Term of FIVE (5) YEARS.

A \$50 special monetary assessment is also imposed pursuant to 18:3013.

The defendant is further required to notify the U. S. Attorney, Collections Division, P. O. Box 61129, Houston, Tx. 77208 in the event of any change in the name or address of the defendant from what is stated above.

Defendant remanded.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ HAYDEN W. HEAD, JR.  
Hayden W. Head, Jr.  
United States District Judge

APPROVED AS TO FORM:

/s/ VA, JR.  
V. Aguilar, Jr., SUSPO

Date: May 23, 1986

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

CR. NO. C-86-33

UNITED STATES OF AMERICA

v.

MARY DANGERFIELD BENGIVENGA

(Filed April 23, 1986)

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON MOTION TO SUPPRESS

Defendant Mary Dangerfield Bengivenga has moved to suppress her incriminating statements and tender of incriminating evidence made to a Border Patrol Agent at the Falfurrias border checkpoint, Brooks County, Texas, on February 1, 1986. After an evidentiary hearing, the Court makes the findings of fact set forth below.

1. The Defendant was traveling north with a companion on a Valley Transit Company bus on Highway 281 from the Rio Grande Valley when the bus was stopped routinely for an alien check at the Falfurrias checkpoint. As customary, a Border Patrol agent, in this case Agent Santana, boarded the bus for routine questioning of all passengers as to their citizenship. In response to routine questions by Santana of citizenship and destination, the Defendant and her companion stated they were United States citizens and that they were going to Alice, Texas.

2. After checking the citizenship of all passengers, Santana then left the bus to examine the luggage bins in the bus for aliens. When the bins were opened, he faintly smelled the marijuana, the odor of which he narrowed to three suitcases marked as bound for Alice, Texas. Agent Ramos, who had been watching the doorway of the bus, confirmed to Santana he could also smell the marijuana. Santana identified to Ramos the Defendant and her companion as the only two passengers on the bus who were Alice bound. The two women were seated above the luggage bin on the bus and the woman closest to the window appeared very concerned with the actions of the two agents, whom she could see through the window.

3. Ramos then boarded the bus and asked the Defendant and her companion where they were going. Their response was Alice. To Ramos, both appeared nervous. He asked if they had luggage and they responded no. He then asked the two women to step off the bus for further questioning. He testified his motivations were two—to avoid embarrassment to the women during further questioning and to insure safety to other passengers. Ramos also testified that armed escorts often accompany persons who transport drugs on buses.

4. The women agreed and were escorted to the permanent trailer at the checkpoint. The luggage was also taken. The bus waited. Ramos asked if the luggage belonged to the Defendant and her companion and they said no. Then he asked the Defendant to produce her ticket. In doing so, she reached in her back pocket and opened the envelope that contained the ticket. When she opened the envelope, Agent Ramos was able to see three luggage tickets in the envelope. He asked for



those tickets and when they were produced he saw they matched the ticket stubs on the three suspect bags, which were then opened, and found to contain marijuana. This entire procedure took approximately 90 seconds. When the marijuana was discovered, the Defendant was placed under arrest and given *Miranda* warnings.

5. Agent Ramos was the only witness to testify at the suppression hearing. The Defendant did not testify.

6. This checkpoint is the same checkpoint that has been determined to be the functional equivalent of the border by courts of the United States and the Court takes judicial notice of that fact.

7. At oral argument following testimony and oral findings of fact by the Court, both parties agreed there was no probable cause to arrest the Defendant at the time she was escorted to the checkpoint trailer.

8. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such.

### *Conclusions of Law*

1. It is undisputed that the initial stop and questioning of the Defendant were lawful based on the functional equivalent and permanent status of the Falfurrias checkpoint. *United States v. Martinez-Fuerte*, 96 S. Ct. 3074, 3085 (1976).

2. The seizure of the Defendant for further questioning in the checkpoint trailer was reasonable by analogy to the selective referral of motorists to secondary checkpoints for further questioning. In *Martinez-Fuerte*, such referrals at permanent checkpoints were found to be constitutionally permissible even if based on criteria,

such as Mexican ancestry, that would not amount to reasonable suspicion. *Id.*

The Defendant in this case happened to be on a bus full of people. This fact required modification of the selective referral procedure used for motorists. While other alternatives may have been available, the method chosen by the Border Patrol agents in this case was reasonable. There was no evidence of coercion, rough treatment, or other factors which would indicate that the intrusion on the right of personal security of the Defendant was more than minimal. The detention was brief, there was reasonable suspicion to investigate, the agents had to consider their own safety and that of the other passengers, the questions asked were limited in scope, and, most importantly, the bus had not been released to proceed without the Defendant.

3. Even if the detention of the Defendant were not justifiable by analogy to secondary checkpoint referrals, it can be analyzed as a *Terry* stop. *Terry v. Ohio*, 88 S. Ct. 1868 (1968).

The Border Patrol agents would have been derelict had they not taken some direct action to confirm or dispel their suspicions under these circumstances. The Defendant was about to depart from the isolated checkpoint. There was some possibility that the luggage might be traveling as cargo or that it might belong to another passenger who either had not told Agent Santana what his or her destination was or who had somehow arranged to pick up the luggage in Alice.

The Defendant and her companion had a limited expectation of privacy on a public bus legitimately stopped at a border checkpoint. They had acknowledged

they were traveling to Alice, had denied having any luggage, and yet were observed to be acting nervously. These circumstances made it reasonable for the Border Patrol agents to investigate further by briefly detaining the Defendant in the checkpoint trailer. The questions asked were related in scope to the suspicions of the agents and did not constitute an unlawful "search" leading to bus and luggage claim tickets.

4. The Defendant contends that she produced her bus and luggage claim tickets without benefit of a *Miranda* warning and that the tickets cannot therefore be admitted into evidence or provide a lawful basis for her arrest.

Interrogations during *Terry* stops do not require *Miranda* warnings. *Berkemer v. McCarty*, 104 S. Ct. 3138 (1984). Furthermore, the Defendant was not "in custody" under the Fifth Circuit four-factor test most recently applied in *United States v. Alvarado Garcia*, 781 F.2d 422, 425-27 (5th Cir. 1986).

There was no probable cause to arrest the Defendant until after she had actually produced the luggage claim tickets in response to a question about her bus tickets. Once the claim stubs were found to match and the suitcases were found to contain marijuana, the Defendant was arrested and given *Miranda* warnings.

The Border Patrol agents' subjective intent was to restrict the Defendant's freedom of movement for a limited and brief investigation of suspicious circumstances. As noted above, the bus was waiting for the Defendant. Had there been an intent to hold the Defendant, the bus would have been released.

It is not reasonable to determine that the Defendant held a subjective belief of custody or coercion. Because

the Defendant did not testify on this issue, the Court must determine the Defendant's belief from the circumstances. The Defendant was not ordered, but was asked, to get off the bus, which waited. The agent asked the Defendant if the suspect luggage belonged to her and requested her bus ticket. The Defendant had been told the purpose of the detention and, as a traveler in the context of a border stop, can be assumed to have anticipated a brief interruption in travel and some degree of scrutiny. The indicia of a formal arrest simply were not present.

Although the investigation had focused upon the Defendant and her companion, this factor, in the absence of the other three, is insufficient to render the investigation custodial. *Id.* at 426.

Accordingly, the Defendant's motion to suppress any incriminating statements or the tender of incriminating evidence is denied.

5. Also denied is any motion to suppress the seizure of the luggage and examination of it. The odor of marijuana led the officers to conclude reasonably that contraband was within it, thereby making it available to search at a functional equivalent of the border without a warrant. *United States v. Bender*, 588 F.2d 200 (5th Cir. 1979).

6. If any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

ORDERED this 23rd day of April, 1986.

/s/ HAYDEN W. HEAD, JR.  
Hayden W. Head, Jr.  
United States District Judge

(2)

No. 88-170



---

**In the Supreme Court of the United States**

**OCTOBER TERM, 1988**

---

**MARY DANGERFIELD BENGIVENGA, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**CHARLES FRIED**  
*Solicitor General*

**EDWARD S.G. DENNIS, JR.**  
*Acting Assistant Attorney General*

**MERVYN HAMBURG**  
*Attorney*

*Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

---

1399





### QUESTIONS PRESENTED

1. Whether petitioner should have received *Miranda* warnings before being questioned by a Border Patrol officer.

2. Whether petitioner's act of producing her baggage claim stubs in response to the officer's request was testimonial for purposes of the Fifth Amendment privilege against compulsory self-incrimination.





## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	5
Conclusion .....	10

## TABLE OF AUTHORITIES

### Cases:

<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984) .....	4, 5, 6
<i>California v. Beheler</i> , 463 U.S. 1121 (1983) .....	5, 7
<i>Doe v. United States</i> , No. 86-1753 (June 22, 1988) .....	9
<i>Minnesota v. Murphy</i> , 465 U.S. 420 (1984) .....	5-6, 8, 9
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) .....	7
<i>New York v. Quarles</i> , 467 U.S. 649 (1984) .....	5, 8
<i>Oregon v. Elstad</i> , 470 U.S. 298 (1985) .....	8
<i>Oregon v. Mathiason</i> , 429 U.S. 492 (1977) .....	5
<i>Schmerber v. California</i> , 384 U.S. 757 (1966) .....	9
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980) .....	7

### Constitution and statute:

#### U.S. Const.:

Amend. IV .....	9
Amend. V .....	5, 8, 9
21 U.S.C. 841(a)(1) .....	1



# **In the Supreme Court of the United States**

OCTOBER TERM, 1988

---

No. 88-170

MARY DANGERFIELD BENGIVENGA, PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the three-judge panel of the court of appeals (Pet. App. 34a-39a) is reported at 811 F.2d 853. The opinion of the en banc court of appeals (Pet. App. 1a-33a) is reported at 845 F.2d 593.

## **JURISDICTION**

The judgment of the court of appeals was entered on May 25, 1988. The petition for a writ of certiorari was filed on July 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing 24 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

She was sentenced to four years' imprisonment and a five-year special parole term. A divided panel of the court of appeals reversed the conviction. The en banc court of appeals overturned the panel opinion and reinstated the conviction.

1. Shortly after midnight on February 1, 1986, a bus arrived at a fixed border checkpoint located seven miles south of Falfurrias, Texas. Border Patrol Agent Samuel Santana boarded the bus for a routine inquiry into the citizenship of each of the 10 to 15 passengers who were aboard. Two of the passengers, petitioner and her companion Dolly Gore, told Agent Santana that they were destined for Alice, Texas. Pet. App. 2a-3a, 42a.

Following that inquiry, Agent Santana left the bus to examine the luggage bins for illegal aliens. He found no one hiding there, but he detected the odor of marijuana emanating from three similar suitcases in the front compartment. Agent Santana called Agent Guillermo Ramos to the luggage bin area, and Agent Ramos agreed that the odor was that of marijuana. The agents then removed the suitcases from the luggage bin, examined the baggage claim tags affixed to the suitcases, and determined that the suitcases were bound for Alice. Throughout their inspection, the agent saw petitioner and Gore peering nervously out the bus window. Pet. App. 3a, 43a.

Santana told Ramos that those two women were the only passengers who had said that they were going to Alice. Agent Ramos then entered the bus. He first spoke with two men sitting in front of petitioner and Gore and learned that they were traveling to San Antonio. Agent Ramos then asked the women their destination and was told that they were going to Alice. Agent Ramos asked if either had any luggage checked in the bins. They denied having any checked luggage. Pet. App. 3a, 43a.

Agent Ramos then asked petitioner and Gore to step off the bus, a routine procedure that avoids embarrassment to suspects and protects other passengers. Outside the bus, Agent Ramos pointed to the three suitcases guarded by Agent Santana and asked if either petitioner or Gore owned them; both denied ownership. Agents Ramos and Santana carried the luggage into the checkpoint trailer (a converted mobile home) and asked petitioner and Gore to step inside. Inside the trailer, Agent Santana began to fill out a baggage receipt form for the bus driver, who was also inside drinking coffee. Agent Ramos again asked the women whether they owned the suitcases, and the women nervously denied owning them. Agent Ramos then asked petitioner and Gore if he could see their bus tickets. He checked Gore's ticket and found that it was in order. When petitioner opened the envelope containing her ticket, Agent Ramos noticed that three baggage claim stubs were attached to it. He asked to see the stubs and also asked whether they belonged to petitioner. Petitioner replied that she did not know how they came to be there. After matching the stubs to the three suitcases, Agent Ramos arrested petitioner and Gore, advised them of their *Miranda* rights, and opened the luggage. He found about 55 pounds of marijuana inside the suitcases. About a minute and a half elapsed between the time that petitioner and Gore had entered the trailer and the time of their arrest. Pet. App. 3a-4a.

2. Before trial, petitioner moved to suppress her statements to the agents, her bus ticket, the baggage claim stubs, and the marijuana. She claimed that she was in custody when she entered the trailer and therefore should have been given *Miranda* warnings before being questioned. After a hearing, the district court denied the motion. The court ruled that petitioner was not in custody

while she was in the trailer and therefore was not entitled to *Miranda* warnings. Pet. App. 46a-47a.

3. The court of appeals reversed by a divided vote. Pet. App. 34a-39a. Applying a four-part test then prevailing in that circuit for determining whether a person is in custody for purposes of *Miranda*,<sup>1</sup> the majority concluded that petitioner was in custody because there was probable cause to arrest her and because the investigation had begun to focus on her. *Id.* at 38a. The majority therefore ordered the suppression of petitioner's "answers to the questions and the production of her ticket and baggage claim stubs." *Ibid.* The dissenting judge concluded that petitioner was not in custody because Agent Ramos lacked probable cause to arrest her. *Id.* at 39a.

4. After rehearing the case, the en banc court of appeals overturned the panel decision and reinstated the conviction. Pet. App. 1a-20a. At the outset, the majority (which included the author of the panel opinion) abandoned the four-part test previously used by the circuit to determine whether a person is in custody under *Miranda*, on the ground that that test was inconsistent with this Court's precedents, particularly *Berkemer v. McCarty*, 468 U.S. 420 (1984). Pet. App. 7a-11a. Employing the "reasonable person" standard adopted in *Berkemer*, the court found that petitioner was not in custody when she was interviewed in the trailer and therefore was not entitled to *Miranda* warnings before questioning. *Id.* at 12a-17a. In addition, the court held that, even if petitioner was entitled *Miranda* warnings, the proper remedy for

---

<sup>1</sup> The Fifth Circuit's test required a court to consider (1) whether there was probable cause to arrest the person who was questioned; (2) whether the officer subjectively intended to restrain that person; (3) whether that person subjectively believed that his freedom was significantly restrained; and (4) whether the investigation had begun to focus on that person. Pet. App. 37a.



that violation would not include the suppression of petitioner's bus ticket and baggage claim stubs, since those items were nontestimonial evidence. *Id.* at 17a-20a.

The dissenting judges agreed that the Fifth Circuit's prevailing test for custody was inconsistent with this Court's precedents and therefore had to be discarded. Pet. App. 21a. They believed, however, that petitioner was in custody from the moment that she entered the trailer. *Id.* at 27a-30a. The dissenters also believed that petitioner's act of producing her bus ticket and the baggage stubs was testimonial and therefore protected by the Fifth Amendment privilege against compulsory self-incrimination. *Id.* at 31a-33a.

#### ARGUMENT

Petitioner contends that she should have received *Miranda* warnings before being questioned in the check-point trailer and that her statements, her bus ticket and baggage claim stubs, and her act of producing those items should have been suppressed at trial. The en banc court of appeals correctly rejected those claims, and its fact-bound ruling does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by the Court is not warranted.

1. It is well settled that *Miranda* warnings must be given to a person before questioning only if he is "in custody," and a person is not "in custody" under *Miranda* unless he is subjected to a " 'formal arrest or restraint on [his] freedom of movement of the degree associated with a formal arrest.' " *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)); accord *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *New York v. Quarles*, 467 U.S. 649, 655 (1984); *Minnesota v. Murphy*, 465 U.S. 420, 430-431

(1984). Moreover, that inquiry must be answered by determining how a reasonable person in the suspect's position would have understood his situation. *Berkemer v. McCarty*, 468 U.S. at 442. Finally, a person need not be given *Miranda* warnings during a *Terry* stop when he is briefly detained for investigative purposes. *Id.* at 440.

Petitioner does not quarrel with any of those principles. Instead, she argues only that she was in custody when she entered the trailer, for the reasons given by the dissenting judges below. Petitioner and the dissenting judges rely largely on the fact that she was questioned in a nearby trailer, rather than on the bus. That fact, however, did not convert the investigative detention of petitioner into an arrest, because the circumstances under which she was questioned were not equivalent to a formal arrest.

Petitioner was not told that she was under arrest, she was not handcuffed or physically restrained, and Agent Ramos did not use or threaten to use force against her in any way. The scene inside the trailer also was not intimidating. There were no jail cells and no overwhelming presence of uniformed and armed police officers; there were only the two Border patrol officers, petitioner and her companion, and the bus driver, who was innocuously enjoying a cup of coffee. The bus driver's presence underscored the informality of the setting and made petitioner aware that she had not lost access to her means of transportation in the event that the agents became satisfied that she was not connected to the incriminating suitcases. In addition, Agent Ramos asked petitioner and Gore only a few questions during an encounter that lasted no more than 90 seconds before petitioner was placed under arrest. During that interval, only three events occurred that affected petitioner: when asked about the suitcases, she denied that they belonged to her; when asked to produce

her bus ticket, she displayed an envelope containing the ticket and baggage claim checks; and when asked about the baggage checks, she professed not to know how they came to be attached to her bus ticket. None of those circumstances converted what was to that point a non-custodial setting into a custodial one. Finally, the fact that the agents had seized petitioner's luggage is immaterial, because petitioner had disclaimed any ownership interest in the three bags.

In sum, the scene inside the trailer was a far cry from the one that prompted this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), to demand that a suspect be told about his rights to silence and counsel before being questioned. The district court found that "[t]here was no evidence of coercion, rough treatment, or other factors which would indicate that the intrusion on the right of personal security of [petitioner] was more than minimal" (Pet. App. 45a), and petitioner does not claim that that finding is clearly erroneous. Under these circumstances, the fact that petitioner was questioned in a nearby trailer office was not sufficiently coercive to render the questioning custodial in nature. See *California v. Beheler, supra*, and *Oregon v. Mathiason, supra* (holding that *Miranda* warnings were not required even though the suspect was questioned at a police station); cf. *United States v. Mendenhall*, 446 U.S. 544, 557-558 (1980) (asking a suspect at an airport to accompany narcotics agents to their airport office does not necessarily amount to an arrest).

The dissenting judges below concluded that "the character of the questioning changed as soon as [petitioner] was moved from the area outside the bus to the checkpoint trailer" (Pet. App. 29a), since the questioning was not public, petitioner was not driving her own car, and she was not free to leave at the close of questioning.

*Id.* at 27a. None of those factors, however, was sufficient to render the interview custodial. First, even if the interview did not take place in public, petitioner was not alone with the officers, since the bus driver was also in the trailer. Moreover, in *Minnesota v. Murphy*, *supra*, this Court rejected the claim that questioning is inherently coercive if there are no observers to guard against police abuse or trickery (see 465 U.S. at 432-433 (questioning of a probationer by his probation officer)), and in *Beheler* and *Mathiason* this Court found that *Miranda* warnings were unnecessary even though the suspect was questioned at a police stationhouse. Second, the fact that petitioner was traveling by bus rather than in her own car did not render the detention coercive, since the bus had not left. Finally, the fact that petitioner was not free to leave at the end of Agent Ramos's questioning because she was arrested is irrelevant to the inquiry whether the preceding events were custodial. Otherwise, every arrest would retroactively render a person in custody even in the absence of any preceding coercion.

Even if petitioner was in custody while she was in the trailer, the appropriate remedy would have been to suppress the statements petitioner made, not physical evidence such as the baggage claim stubs and the bus ticket. See *Oregon v. Elstad*, 470 U.S. 298 (1985) (*Miranda* does not require suppression of derivative evidence); *New York v. Quarles*, 467 U.S. at 665-672 (opinion of O'Connor, J.) (*Miranda* does not require suppression of physical evidence). As the en banc court of appeals correctly held (Pet. App. 18a), the bus ticket and baggage claim stubs amounted to "real" or "physical" evidence, rather than evidence of a "communicative" nature. The Fifth Amendment would not require the exclusion of those items, even if petitioner were compelled to hand them over, because

the Amendment does not protect against the compulsory production of physical evidence. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); see generally *Doe v. United States*, No. 86-1753 (June 22, 1988), slip op. 9 (collecting cases). Moreover, the only statements that petitioner made while she was in the trailer were her repeated denials that the suitcases were hers. Those utterances were cumulative to the identical statements that petitioner made before she entered the trailer, and petitioner does not claim that her earlier statements were inadmissible. Under these circumstances, any error in the admission of the statements petitioner made in the trailer was harmless.

2. There is also no merit to petitioner's claim that her act of producing her bus ticket and baggage claim stubs was testimonial, and that those two items and her act of producing them should have been excluded at trial. Unlike the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment privilege against compulsory self-incrimination is not, as a general rule, self-executing. Instead, a person must invoke the privilege when faced with compulsion, or the privilege will be deemed to have been waived. *Minnesota v. Murphy*, 465 U.S. at 427-429. The only exception to that rule potentially applicable here is the case of custodial police interrogation. *Id.* at 429-434. Petitioner, however, was not "in custody" when she was questioned inside the office, as explained above. Accordingly, petitioner's failure to object to Agent Ramos's request to see her bus ticket amounted to a waiver of any contention that the act of producing that ticket and the baggage claim stubs violated the Fifth Amendment.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

**CHARLES FRIED**

*Solicitor General*

**EDWARD S.G. DENNIS, JR.**

*Acting Assistant Attorney General*

**MERVYN HAMBURG**

*Attorney*

SEPTEMBER 1988

